Mohd Nahar bin Abu Bakar v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–371 OF 2010
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND ZAWAWI SALLEH JJCA
22 MAY 2013

Evidence — Corroboration — Child witness — Whether circumstantial evidence corroborated evidence of child eye witness to murder — Whether child's recognition of assailant from previous visits to house more important than failure to identify him at identification parade — Whether child witness even able to show how accused stabbed deceased — Whether evidence of witness could not be rejected simply because she was related to deceased — Whether circumstantial evidence pointed to accused's guilt

The appellant ('accused') was convicted and sentenced to death by the High Court for murdering a woman ('the first deceased') and a child ('the second deceased') she was baby-sitting in a house. The prosecution evidence revealed that the accused went to the house in a car with his lover, SP13, on the pretext of wanting to visit a friend in the area and that after telling SP13 to wait in the car he went into the house to commit the murders. Among the prosecution witnesses was a child, SP15, who said she witnessed the accused stabbing the first deceased; a neighbour, SP9, who said he saw a man wearing clothes similar to what the accused was wearing, running away from the house; and SP13 who told the court that when the accused returned to the car his shirt was blood-stained and his hand was injured, that the accused owned a Rambo knife matching the description of the murder weapon, that the accused was nervous and agitated ever since he returned to the car and that after leaving her at a bus station he reminded her to keep a low profile. In his instant appeal against conviction and sentence, the appellant said, inter alia, it was unsafe to rely on the uncorroborated evidence of SP15 who could not identify him at an identification parade and that SP13's evidence ought to be rejected because she was related to the first deceased and SP15.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The submission that SP15's evidence was uncorroborated was without merit. Her failure to identify the appellant was because the identification parade was held six years after the attack. The appellant was not a stranger to SP15. To that extent, the identification parade was of less importance than if the assailant had been an unknown person whom SP15 had to identify. SP15 told the court that on the fateful day 'uncle' ('the

appellant') spent a substantial time at the house talking to the first deceased and that it was he who stabbed her. She could even demonstrate the direction from which the first deceased was stabbed. The trial judge found SP15 to be truthful and her evidence when considered with all the other evidence led to the irresistible inference the appellant was at the crime scene that fateful day (see paras 47 & 49).

(2) The mere fact SP13 was SP15's biological mother did not mean her evidence should be viewed with suspicion. Her evidence was entitled to credence until cogent reasons for disbelieving it was advanced. SP13's evidence was not biased; in fact she was in love with the appellant. The mere fact she was closely related to the deceased was insufficient reason to disregard her testimony (see paras 27 & 31).

(3) SP13's evidence on the appellant's conduct, that he was nervous and agitated for several hours after he returned from the first deceased's house, was not challenged by the defence during cross-examination. The conduct was admissible under s 8(2) of the Evidence Act 1950. His conduct necessitated an explanation from him under s 9 of the same Act. SP13's evidence that the appellant reminded her to keep a low profile was also not challenged. The inference to be drawn from the appellant's conduct against the background of the other evidence was that he was involved in the crime (see paras 36–37 & 44).

(4) The appellant's defence was a bare denial. He never suggested that he was never in the first deceased's house that fateful day; in fact, it was said that he was there briefly to give a card to the first deceased. The defence failed to raise a reasonable doubt on the prosecution case. All the evidence when bound together pointed towards the appellant's guilt (see paras 40, 45 & 55).

[Bahasa Malaysia summary

Perayu ('tertuduh') telah disabit dan dihukum mati oleh Mahkamah Tinggi kerana membunuh seorang wanita ('si mati pertama') dan seorang kanan-kanak ('si mati kedua') yang dijaganya di sebuah rumah. Keterangan pendakwaan menunjukkan bahawa tertuduh telah pergi ke rumah itu dengan kereta bersama kekasihnya, SP13, atas alasan ingin melawat kawan di kawasan itu dan selepas memberitahu SP13 untuk tunggu dalam kereta dia telah masuk ke rumah itu untuk melakukan pembunuhan tersebut. Antara saksi pendakwaan adalah seorang kanak-kanak, SP15, yang menyatakan dia telah menyaksikan tertuduh menikam si mati pertama; seorang jiran, SP9, yang menyatakan dia melihat seorang lelaki memakai pakaian sama dengan tertuduh, melarikan diri dari rumah itu; dan SP13 yang memberitahu mahkamah bahawa semasa tertuduh kembali ke kereta kemejanya berlumuran darah dan tangannya cedera, dan tertuduh memilik pisau Rambo yang sepadan dengan huraian senjata pembunuhan itu, bahawa tertuduh gugup dan gelisah

sejak dia kembali ke kereta dan selepas ditinggalkan di stesen bas dia diingatkan untuk tidak menonjolkan diri. Dalam rayuan ini terhadap sabitan dan hukuman, perayu berkata, antara lain, ia adalah tidak selamat untuk bergantung kepada bukti yang tidak disokong yang diberikan oleh SP15 yang tidak dapat mengecamnya dalam kawad cam dan bahawa keterangan SP13 itu patut ditolak kerana dia mempunyai kaitan dengan si mati pertama dan SP15.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Penghujahan bahawa bukti SP15 adalah tidak disokong adalah tanpa merit. Kegagalan beliau untuk mengenal pasti perayu adalah kerana kawad cam ini diadakan enam tahun selepas serangan itu. Perayu bukan orang asing kepada SP15. Sehingga menjadikan, kawad cam itu kurang penting berbanding jika penyerang itu seorang yang tidak dikenali yang mana perlu dikenal pasti oleh SP15. SP15 memberitahu mahkamah bahawa pada hari kejadian itu 'uncle' ('perayu') telah menghabiskan masa yang lama bercakap dengan si mati pertama dan dia adalah orang yang menikam si mati pertama. Dia juga boleh menunjukkan arah di mana si mati pertama ditikam. Hakim perbicaraan mendapati SP15 bercakap benar dan keterangannya apabila dipertimbangkan dengan semua bukti-bukti yang membawa kepada kesimpulan yang tidak boleh dilawan bahawa perayu berada di tempat kejadian hari itu (lihat perenggan 47 & 49).

(2) Fakta semata-mata bahawa SP13 adalah ibu kandung SP15 tidak bermakna keterangan itu perlu dilihat dengan syak wasangka. Keterangannya berhak untuk dipercayai sehingga terdapat sebab meyakinkan untuk tidak mempercayainya diberikan. Bukti SP13 tidak berat sebelah; bahkan dia bercinta dengan perayu. Fakta semata-mata bahawa dia berhubungan rapat dengan si mati bukan sebab yang mencukupi untuk tidak mengambil kira keterangannya (lihat perenggan 27 & 31).

(3) Keterangan SP13 mengenai kelakuan perayu, bahawa dia gugup dan gelisah untuk beberapa jam selepas dia kembali dari rumah si mati pertama, tidak dicabar oleh pihak pembelaan semasa pemeriksaan balas. Kelakuan itu boleh diterima di bawah s 8(2) Akta Keterangan 1950. Kelakuannya memerlukan penjelasan daripadanya di bawah s 9 Akta yang sama. Keterangan SP13 bahawa perayu mengingatkannya untuk tidak menonjolkan diri juga tidak dicabar. Kesimpulan yang boleh dibuat daripada perlakuan perayu terhadap latar belakang keterangan lain adalah bahawa dia telah terlibat dalam jenayah itu (lihat peranggan 36–37 & 44).

(4) Pembelaan perayu adalah penafian semata-mata. Dia tidak pernah mencadangkan bahawa dia tidak pernah berada di rumah si mati pertama pada hari kejadian itu, bahkan, adalah dikatakan bahawa dia berada di

sana sekejap untuk memberi kad kepada si mati pertama. Pembelaan gagal menimbulkan keraguan munasabah terhadap kes pendakwaan. Semua bukti apabila terikat bersama-sama terarah terhadap kesalahan perayu (lihat perenggan 40, 45 & 55).]

Notes

For cases on child witness, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1144–1151.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359, HC (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Balasingham v PP [1959] 1 MLJ 193, HC (folld)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Emperor v Dhirajia AIR 1940 All 486, HC (refd)
Heng Aik Ren Thomas v PP [1998] 3 SLR 465, CA (refd)
Jadunath Singh v State of UP AIR 1971 SC 363, SC (refd)
Liow Siow Long v PP [1970] 1 MLJ 40; [1969] 1 LNS 98 (folld)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
Megat Halim Megat Omar v PP [2008] MLJU 647; [2009] 1 CLJ 154, CA (refd)
Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
Muniandy a/l Subramaniam v PP [2006] 6 MLJ 623, CA (refd)
Ong Teng For & Anor v PP [2012] 2 MLJ 666; [2013] 1 CLJ 39, CA (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561; [1992] 4 CLJ 2086, SC (refd)
PP v Richard Devadasan a/l Sabariah [2005] 3 MLJ 17, CA (refd)
PP v Sainin Othman [2011] 1 CLJ 626, CA (refd)
R v Turnbull and others [1976] 3 All ER 549, CA (refd)
ST Shinde v State of Maharashtra AIR 1974 SC 791, SC (refd)

Legislation referred to

Evidence Act 1950 ss 8(2), 9, 133A
Penal Code ss 300, 300(d), 302

Appeal from: Criminal Trial No 45B-177 of 2009 (High Court, Shah Alam)

K Viknesvaran (Viknes Ratna & Co) for the appellant.
Najib bin Zakaria (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] This is a judgment with which all members of the court agree.

[2] Challenge in this appeal is the conviction and sentence imposed upon the appellant herein, by the High Court Shah Alam, Selangor. The appellant was charged and tried for two offences of murder punishable under s 302 of the Penal Code. At the end of the defence case, the appellant was convicted and sentenced to death.

[3] We heard the appeal on 3 January 2013 and dismissed it for lack of merit. The conviction and sentence passed by the High Court were affirmed.

THE CHARGES

[4] The charges proffered against the appellant are as follows:

First Charge:

> Bahawa kamu pada 30.12.2003 jam lebih kurang 1 petang di rumah No. 19, Tingkat 5 Flat Cempaka Bandar Baru, Klang telah melakukan bunuh dengan sengaja menyebabkan kematian seorang perempuan Melayu bernama Siti Rohana bt Bahrum kad pengenalan 690727-10-5032, oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 302 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

Second Charge:

> Bahawa kamu pada 30.12.2003 jam lebih kurang 1 petang di rumah No. 19, Tingkat 5 Flat Cempaka Bandar Baru, Klang telah melakukan bunuh dengan sengaja menyebabkan kematian seorang budak lelaki bernama Muhammad Nur Osama mykid no. 010908-10-1303, oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 302 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

[5] In order to appreciate the issues raised by the appellant in this appeal, the following salient facts of the case must be noted.

THE PROSECUTION'S CASE

[6] Normah Jantan ('SP13') is the biological mother of Siti Aishah ('SP15')

and Aizat Asmawi ('Awi'). Ever since herbirth, SP15 was cared by SP13's cousin, Muhamad bin Jaafar ('SP9') and his wife, Siti Rohana ('the first deceased'). The first deceased was also the babysitter of the second deceased.

[7] SP13 informed the court that at the material time, she was having a relationship with the appellant. On 2 December 2003, she and Awi visited SP9 and the first deceased at their home. They were accompanied by the appellant. After the visit, SP13 left Awi under the care of SP9 and his wife. Awi returned to his mother on the following week.

[8] On 29 December 2003, the appellant went to the first deceased's house to take back Awi's clothing, while SP13 and Awi waited in the car. They left in the appellant's car an hour later. The appellant asked SP13 the value of a chest length gold necklace in which SP13 estimated at RM1,000.

[9] SP15 was present in the house during both visits by the appellant.

[10] On 30 December 2003, the appellant took SP13 and Awi with his car and they again went to the Cempaka Flat. The appellant told SP13 to wait inside the car while he visited his friend. The appellant was wearing a white shirt and black jeans.

[11] The appellant returned an hour later and took something from the bonnet. He later switched on the engine and informed SP13 he would return in 5–10 minutes.

[12] The appellant only returned after 30 minutes. SP13 saw blood stain on the right side of the appellant's white shirt. The appellant told SP13 that his hand was injured. The appellant was agitated because SP13 was asking too many questions.

[13] The appellant later stopped at a mosque where he changed his clothes. The couple spent the night at Shah Alam. The appellant later abandoned SP13 at the express bus station.

[14] SP15 recounted the events of that fateful day. She was watching the TV programme when the appellant arrived at the house. The appellant was chatting with the first deceased. The first deceased asked for SP13's contact number. The appellant then left the house momentarily and returned with a card.

[15] The appellant gave the card to the first deceased. The first deceased attempted to call SP13 but failed.

[16] Suddenly, SP15 heard a loud noise. She saw the appellant strangled the first deceased, and stabbed the first deceased on her chest. SP15 then escaped from the house and sought help from her neighbour, Aliza bin Husin ('SP6'). SP6 saw a man in white shirt and black trousers escaped through the staircase.

[17] Amran bin Sembak (SP14) was at the parking lot when a man in white shirt and black trousers run passed him and almost collided with him.

[18] When the police arrived at the scene, they found the bodies of both first and second deceased. A Rambo knife (army knife) was recovered by Zamin bin Zamaluddin ('SP10') at the bottom of the stairways. Dr Seah Lay Hong ('SP11') confirmed that the DNA profile found on the knife belonged to both the first and second deceased.

[19] Dr Abdul Karim ('SP17') who conducted the post mortem found two stab wounds on the first deceased. One stab wound measured 4 x 0.5cm, was located on the right forearm. The other stab wound located on the right parasternal was in an 'L' shape, measured 5 cm x 2 cm. The doctor testified that both the right lung and heart were cut. The stab wounds caused massive bleeding which resulted in the death of the first deceased.

[20] SP16 testified that the second deceased was stabbed twice from behind. The first stab wound only penetrated beneath the skin. The second stab wound measured 4.5cm x 2cm was located at the paravetebral region. The second deceased's right lung, liver and diaphragm were cut. The second deceased died from the fatal stab wound.

[21] SP16 testified that the stab wounds on both the deceased would have been caused by a sharp object. The Rambo knife was shown to SP16 and he testified that the knife had the size and shape that is compatible with the wounds inflicted.

[22] After subjecting the prosecution's evidence to a maximum evaluation by following the guidelines laid down in *Looi Kow Chai & Anor v PP* [2003] 2 MLJ 65; [2003] 1 CLJ 734, and *Balachandran v PP* [2005] 2 MLJ 301; [2005] 1 CLJ 85, the learned trial judge found that the prosecution had proved a prima facie case and called upon the appellant to enter his defence.

THE DEFENCE'S CASE

[23] The appellant gave evidence under oath. In a nutshell, the defence of the appellant was that at the material time, he was a drug pusher and also a drug addict. The purpose for being at the scene of the crime was to meet his friend

and client, Wan Gemuk. They were taking drugs near the garbage disposal area. He injured his hand after the two of them got into a fight when Wan Gemuk was unable to settle his debt.

THE APPEAL

[24] Before us, the conviction and sentence imposed upon the appellant were challenged on the following grounds:

(a) SP13's is related to SP15 and the first deceased which would make her an interested witness;

(b) there was no evidence to implicate the appellant; and

(c) SP15 could not identify the appellant at the identification parade and the *Turnbull* guidelines were not satisfied;

[25] We will discuss each of the grounds of appeal in turn.

Ground (a): Interested witness

[26] In the course of the submission, learned counsel for the appellant contended that SP13's evidence ought to be rejected as she was an interested witness due to her familial relation with SP15 and the first deceased, and for that reason SP13's evidence lacked credibility.

[27] After having perused the records and scrutinized SP13's evidence in its entirety, especially how she fared in the course of cross-examination, we are of the considered view that the complaint by learned counsel that SP13 was an interested witness was without basis. The mere fact that SP13 was the biological mother of SP15 does not mean that her evidence must automatically be viewed with suspicion. Her evidence is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances (see *Balasingham v Public Prosecutor* [1959] 1 MLJ 193, *Ong Teng For & Anor v Public Prosecutor* [2012] 2 MLJ 666; [2013] 1 CLJ 39).

[28] In the *Laws of Crimes* by Ratanlal and Dhirajlal (2nd Ed) at p 1455, the following is said in respect of 'related witnesses':

> 'Related' is not equivalent to 'interested'. The term 'interested' postulates that the person concerned has some direct interest in the result of the litigation such as interest in decree in a civil case or in seeing that the accused is punished. A witness who is a natural one but relative of the victim cannot be termed as interested. Close relationship of witness to the deceased is no ground to reject his testimony if otherwise it is reliable. On the contrary, close relative of the deceased would

normally be most reluctant to spare the real assailant and falsely implicate an innocent one (*State v Kalki* AIR 1981 SC 1390).

[29] In *Liow Siow Long v Public Prosecutor* [1970] 1 MLJ 40; [1969] 1 LNS 98, Raja Azlan Shah J (as His Majesty then was) speaking on the same subject, held as follows:

> It is difficult to accept that suggestion that if a witness is shown to be a relation of the deceased his evidence is tainted. Testimony of close relations is not tainted if it is otherwise reliable in the sense that the witnesses are competent witness who were at the scene of the occurrence and could have seen what had happened. But if it is proved that they are not entirely disinterested witnesses eg they are either partisans of the complaint or are in any way inimical to the accused, then their testimony is tainted and requires corroboration if to be acted upon. In my view the circumstances relied upon by counsel is not sufficient to cast any doubt on the evidence of PW1, who is not proved to be inimical to the appellant …

[30] Applying the same principle to the present case, we are of the view that SP13 was neither partisan or was she in any way inimical to the appellant. In fact, SP13 was having a courtship and was very much in love with the appellant. The evidence showed that she was willing to follow the appellant to anywhere even though she knew the appellant was a drug addict.

[31] We cannot accept the submission advanced by learned counsel for the appellant that SP13 was biased because she was related to the first deceased. The mere fact that the witness is closely related to the deceased is not sufficient reason to disregard her testimony. The relationship of SP13 to the first deceased does not render her clear and positive evidence less worthy of full faith and credit.

Ground (b): There is no evidence to implicate the appellant

[32] In considering this ground, we will review the evidence adduced at the stage of the prosecution that justified the calling of the defence, and test it against the defence evidence. After all, an appeal is a continuation of the trial. (see *Muniandy a/l Subramaniam v Public Prosecutor* [2006] 6 MLJ 623, *Public Prosecutor v Sainin Othman* [2011] 1 CLJ 626)

[33] It is trite that in a charge of murder, the prosecution must establish:

(a) the death of both deceased;

(b) the death was caused by the accused;

(c) the accused intended to (a) cause death or (b) intended to cause bodily injury as the accused knows to be likely to cause the death or (c) intended

to cause bodily injury and the injury intended to be inflicted in the ordinary cause of nature to cause death or (d) the accused knew that his act was so imminently dangerous and it must in all probability cause death or such bodily injury as is likely to cause death. (See s 300 of the Penal Code).

[34] After having scrutinised the whole evidence adduced before the court, we are satisfied that the prosecution had established that:

(a) both of the deceased were stabbed using a Rambo knife (exh P1 OB);

(b) SP13 confirmed that the appellant owned a Rambo knife in which the description matched exh P10B;

(c) the stabbings occurred at the vital parts of the bodies;

(d) SP6 saw a man in white shirt and black trousers fled the scene. The attire of the assailant matched the clothing worn by the appellant;

(e) SP9 testified that SP15 told him that the 'uncle' stabbed the first deceased; and

(f) SP13 saw blood stains on the appellant's shirt and his hand was also injured.

[35] SP13 informed the court that after the appellant returned from meeting his friend, he was nervous and agitated. The appellant remained the same throughout the entire night until the next morning. After the appellant left SP13 at the bus station, the appellant conveyed a message to SP13 through a third party and reminded SP13 to keep a low profile for a while until the news die down.

[36] SP13's evidence on the appellant's conduct and reaction was not challenged by the defence during cross-examination. His conduct and reaction were clearly admissible under s 8(2) of the Evidence Act 1950. Viewing the appellant's conduct and reaction in the light of the facts and circumstances of the case, there is no doubt that it proved the nexus and linked the appellant to the crime (see *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717).

[37] To our mind, there is no need for the appellant to behave in such manner and to skip town, unless he was connected to the double murder. His conduct and reaction, therefore justifiably necessitated some explanation from him pursuant to s 9 of the same Act (see *Parlan bin Dadeh*).

[38] In the present case, the prosecution relied on limb (d) of s 300 of the Penal Code. In such a case, the prosecution must establish that the appellant

knew that the act of stabbing was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death.

[39] The conduct of the appellant in striking at a vital spot of both deceased with great force shows it was done with a desire to do great harm. However primitive a man can be, the appellant must be taken to have known that what he did was imminently dangerous that it must in all probability cause bodily injury likely to cause death (see *Emperor v Dhirajia* AIR 1940 All 486).

[40] As regards the defence put forth by the appellant, we agree with the finding of the learned trial judge that the defence is an afterthought. In the court below, the appellant never suggested, as a defence, that he was never in the house on that fateful day. The only challenge to SP15's evidence was that the appellant left shortly after he gave a card to the first deceased. According to the appellant, someone else stabbed the deceased. When the appellant testified, he denied having set foot at the crime scene. By creating a contradicting scenario regarding his defence, the appellant had failed to confront these factual assertions to the respective prosecution's witnesses.

[41] Perusing the appeal records and especially the cross-examination of SP17 and SP18, we find that nowhere was it suggested that the appellant had informed the investigation officers of his whereabouts when the double murder took place and the existence of Wan Gemuk. There was no explanation as to the belated disclosure. By raising it at the 11th hour and only at the defence stage, no opportunity was given to the prosecution to verify its truthfulness. Therefore, we find that the learned trial judge did not err in holding that the defence was an afterthought.

[42] In the case of *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561; [1992] 4 CLJ 2086, Edgar Joseph SCJ (as he then was) had this to say:

> The trial judge appreciated correct law when he held, as he did in fact hold, that the defence is entitled, through cross-examination of prosecution witnesses, to put its case at the earliest possible stage. Indeed, it behoves the defence to do so, for we hardly say that if a defence is sprung in court for the first time when the accused makes his defence from the witness box or the dock so that the prosecution is taken by surprise, the accused runs the risk of being criticised for having kept his defence 'up to his sleeve', so to speak, and be branded as a recent invention.

(See also *Megat Halim Megat Omar v Public Prosecutor* [2008] MLJU 647; [2009] 1 CLJ 154, *AEG Carapiet v AY Derderian* AIR 1961 Cal 359).

[43] The next issue to be considered is whether the appellant's defence has raised a reasonable doubt. In this regard, we remind ourselves of the principle

of law that the degree of cogency, need not reach certainty, but it must carry a high degree of probability (see *Miller v Minister of Pensions* [1947] 2 All ER 372).

[44] The appellant denied being involved in the double murder. However, in his defence, the appellant had not dealt with the prosecution's other strands of evidence. He did not explain why he was nervous, agitated after meeting a friend near the crime scene. No challenge was put across against SP13's evidence that the appellant reminded her to keep a low profile. The inference to be drawn from the evidence of conduct of the appellant against the background of other evidence is that the appellant was involved in the crime and was evading detection by the police.

[45] We are in full agreement with the trial judge's finding that at the stage of the defence the appellant advanced an improbable defence in the form of bare denial. The defence, when tested against the totality of the prosecution's evidence, could not raise a reasonable doubt to the prosecution's case.

Ground (c) Non-compliance of the Turnbull guidelines

[46] Learned counsel further submitted that the prosecution's case centered around SP15's evidence as she witnessed the attack. However, since she could not identify the appellant and the proviso to s 133A of the Evidence Act was not complied with, there was no evidence to implicate the appellant.

[47] We agree with the trial judge's reasoning that SP15's failure to identify the appellant is due to the fact that the identification parade was held six years after the attack. His Lordship found SP15 a credible witness and she would not have concocted the version of events.

[48] It is trite that evidence of identification should be approached with caution. The reliability of the identification evidence depends on a non-exhaustive list of factors such as the length of time that the witness observed the accused, the distance at which the observation was made, the presence of obstructions in the way of the observation, the presence of special reasons for the witness to remember the accused etc (see *R v Turnbull and others* [1976] 3 All ER 549, *Heng Aik Ren Thomas v Public Prosecutor* [1998] 3 SLR 465).

[49] SP15 informed the court that on that fateful day, 'uncle' (the appellant) spent a substantial amount of time at the house with the first deceased. They were seen having a conversation. She was positive that it was 'uncle' who stabbed her mother. She could even demonstrate the direction from which the

first deceased was stabbed. When asked who the 'uncle' is, she said that 'uncle' came to her house with SP13 previously.

[50] SP9 also confirmed that when the appellant visited the house, SP15 addressed him as 'uncle'. SP9 informed the court that immediately after the incident; SP15 informed him that 'uncle' (the appellant) was the person who attacked the first deceased. Other prosecution witnesses also testified that the culprit who escaped from the crime scene was wearing the same clothing as the appellant. SP13 also described that the appellant suffered a hand injury, and there was blood stain on his shirt. The appellant was also seen behaving strangely as he was constantly nervous and agitated.

[51] Identification can be by way of circumstantial evidence. (See *ST Shinde v State of Maharashtra* AIR 1974 SC 791, *Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232). The assailant was not a total stranger to SP15. To that extent, the identification parade was less importance that if the assailant had been unknown persons whom the eye-witness had to identify. (See *Jadunath Singh v State of UP* AIR 1971 SC 363)

[52] The learned trial judge had found that SP15 to be a witness of truth. We see no reason to disturb His Lordship's finding. SP15's evidence, considered with all other evidence, leads towards an irresistible inference that it was the appellant who was at the crime scene on that fateful day.

[53] SP15 was 15 years old when she gave evidence. Section 133A of the Evidence Act 1950 provides that a conviction cannot stand on the uncorroborated evidence of an unsworn child (see *Public Prosecutor v Richard Devadasan a/l Sabariah* [2005] 3 MLJ 17).

[54] In the instant case, as demonstrated above, there is ample evidence to support the prosecution's case. These evidence are independent testimony which affects the appellant by connecting him to the crime. In our considered view, SP15's evidence was only the icing to the cake. Therefore, learned counsel's submission that SP15's evidence was not corroborated is without merit.

CONCLUSION

[55] In conclusion, we are satisfied that at the end of the trial, the prosecution had proved a case beyond reasonable doubt. All the evidence when bound together, point towards the guilt of the appellant.

[56] The appeal is dismissed and the conviction and sentence passed by the High Court affirmed.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar